ELUSIVE GOAL, ENDURING BENEFITS: REGULATION OF AIR QUALITY IN INDIAN COUNTRY AS A TOOL TO PROMOTE SMALL BUSINESS DEVELOPMENT

SEAN J. WRIGHT*

I. INTRODUCTION

The Clean Air Act (CAA) Amendments of 1990[1] represented sweeping changes to the way the federal government regulates air quality.[2] The Environmental Protection Agency (EPA) was tasked with implementing the regulations to effectuate these sweeping changes. But, for nearly two decades the EPA has overlooked developing regulations for an important area of environmental degradation—Indian country.[3]

This oversight has produced significant environmental problems. Unfortunately, "[t]he air quality in Indian communities has increasingly been degraded by sources and activities, including tribal businesses, manufacturing and processing companies, increasing road traffic, and the

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* J.D., The Ohio State University Moritz College of Law, expected 2013; M.A. in Public Policy and Management Candidate, The Ohio State University John Glenn School of Public Affairs, expected 2013; B.A. in Political Science and History, Miami University, 2009. I am deeply thankful to my grandfather for his tireless advocacy on Native American issues, to my family for their unending encouragement, to Professor Cinnamon Carlarne for her guidance and Dania Korkor for constantly inspiring me to pursue my passions.

[1] Clean Air Act Amendments of 1990, Pub. L. No. 91-604, 84 Stat. 1646 (codified as amended in scattered sections of 42 U.S.C.).

[2] *See Overview—The Clean Air Amendments of 1990*, U.S. ENVTL. PROT. AGENCY, http://epa.gov/oar/caa/caaa_overview.html (last updated Dec. 19, 2008).

[3] *See* Rob Capriccioso, *EPA Helps Tribes Clean the Air in Indian Country—Finally*, INDIAN COUNTRY TODAY (July 5, 2011), http://indiancountrytodaymedia network.com/article/epa-helps-tribes-clean-the-air-in-indian-country%25e2% 2580%2594finally-41435; *see also* 18 U.S.C. § 1151 (2006) ("'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.").

influx of new businesses and populations on reservation."[4] The impetus for tribes to regulate air quality is the same for states and the federal government—environmental regulations promote public health in the face of pollution and environmental degradation. Tribal lands have been significantly—and acutely—harmed by pollution.[5] At the same time, "Indian reservations continue to be both a home, culturally and historically, and an economic base, for tribal people, and therefore must be protected and preserved in order to meet the needs of the tribes presently and in the future."[6] Thus, the failure to regulate air quality poses serious economic risks for Indian country.

Economic development has also suffered from regulatory uncertainty.[7] The regulatory structure enacted through the Clean Air Act Amendments of 1990 meant that economic development that impacted air quality, but also brought about jobs and generated economic growth, could develop throughout the United States but not in Indian country.[8] This gap meant that "if a company's activity required a permit under the Clean Air Act, it could get a permit only if it located outside of Indian country."[9] An integral component of the CAA is the New Source Review (NSR). NSR "requires stationary sources of air pollution to get permits before they start

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[4] Jeanette Wolfley, *Tribal Authority to Regulate Air Quality*, AIR QUALITY REG. FOR NAT. RESOURCES INDUSTRY (Rocky Mountain Mineral Law Found., Westminster, Colo.), Jan. 2000, at 1.

[5] *Id.*

[6] *Id.*

[7] E. Donald Elliott, *Global Climate Change and Regulatory Uncertainty*, 9 ARIZ. J. INT'L & COMP. L. 259, 259 (1992) ("In the same way that we must judge when a sufficient technical consensus has emerged to warrant action, we must also judge when a sufficient consensus has emerged about what policy instruments to apply. Deciding what our policy response to a problem should be is also the source of a substantial degree of uncertainty.").

[8] As part of the 1990 Amendments, the Administrator of the EPA was allowed to treat qualifying tribes as states for the purposes of the CAA. *See* 42 U.S.C. §§ 7410(o), 7601(d). This allowed tribes to submit Tribal Implementation Plans (TIPs), establishing comprehensive regulation of air quality in Indian country. *Id.* Nationally, tribes have not overwhelming submitted TIPs, leaving the EPA as the primary regulator of air pollution. *See* William C. Scott, *EPA's Minor Source Program in Indian Country* 2 (Rocky Mountain Mineral Law Found., Paper No. 4A, 2007). Retaining primacy, the EPA had failed for over twenty years to promulgate rules regulating Minor Sources, Synthetic Sources and Major Sources in nonattainment zones in Indian country. For a lengthy discussion of this dynamic, see *infra* Part II.

[9] Capriccioso, *supra* note 3 (quoting Philip Baker-Shenk, a partner with Holland & Knight LLP). Baker-Shenk further opined: "[A]s if tribes needed another obstacle to economic development on their lands." *Id.*

construction."[10] There are three NSR permitting requirements: (1) Prevention of Significant Deterioration (PSD) permits for major sources (or those emitting pollution at a significant level dictated by CAA regulations) in attainment areas, (2) nonattainment NSR for new major sources or major modifications to existing sources in nonattainment areas and (3) minor sources that emit pollution at rates below major levels.[11]

As will be discussed subsequently in this comment,[12] this regulatory regime has particularly discouraged the development of small businesses in Indian country. This regulatory gap has prevented everything from auto body shops, dry cleaners, gas stations, sand and gravel mining, sawmills, sewage treatment facilities and solid waste landfills from developing out of fear of future permitting or a hesitancy to apply for major source permits which are time consuming, expensive and intended to cover major polluters.[13]

The recent publication of the EPA's Final Rule "Review of New Sources and Modifications in Indian Country" establishes two NSR regulations for the maintenance of clean air in Indian country.[14] These rules substantially change the regulatory environment and "mean monumental changes to how facilities in Indian country must operate in the future."[15] This measure fills regulatory gaps in the administration of the CAA by developing procedures concerning emissions from both minor and major sources in Indian country. At the same time, these measures add additional requirements to the operation of new and existing sources of pollution on tribal land.

Stated briefly, the first rule, Tribal Minor New Source Review Rule, applies to new and modified minor stationary sources of pollution and to small modifications to existing major stationary sources.[16] The second rule, Tribal Nonattainment Major NSR Rule, applies to new and modified stationary sources in the areas of Indian country that have been designated as nonattainment for the National Ambient Air Quality Standards

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[10] *New Source Review, Basic Information*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/nsr/info.html (last visited Mar. 30, 2013).

[11] *Id.*; *see also infra* notes 33–36.

[12] *See infra* Part II.B.

[13] Capriccioso, *supra* note 3; Robert Gruenig, *EPA's New Air Rules Mean Monumental Changes for Emissions in Indian Country*, ABA TRENDS, July/Aug. 2012, at 4.

[14] Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. 38,748, 38,748 (July 1, 2011) (to be codified at 40 C.F.R. pts. 49 & 51).

[15] Gruenig, *supra* note 13.

[16] Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. at 38,748.

(NAAQS) of the CAA.[17] In essence, the second rule provides regulation for sources with the potential to emit a substantial amount of pollution in an area of the country already struggling to reach desirable air quality. These new rules achieve the elusive goal of environmental law—promoting environmental health and economic development.

Part II of this comment examines the new rules in the context of the larger CAA regulatory scheme for Indian country and suggests that the new rules fill important regulatory gaps. Part III discusses the pending legal challenges to the Final Rule before examining how and why the rules further an important purpose of the CAA—to support tribal supervision of reservation air quality. Finally, Part IV concludes that the new Final Rule lays necessary groundwork for meeting the important goals of the CAA and preserving and promoting public health and economic development in Indian country.

II. NEW SOURCE REVIEW: PROMOTING TRIBAL SELF-DETERMINATION

The EPA action to regulate air quality in Indian country has been noticeably absent. These rules redress this oversight and further the important objectives of economically sensible environmental regulations. Additionally, the rules promote tribal sovereignty. As one commentator has described:

> While tribal sovereignty is constrained by tribal borders, tribal air blows over tribal boundaries . . . . The new EPA NSR rules will not only help clean up tribal air, but also give federal blessing to air permits issued by Indian tribes in the exercise of their geographic jurisdictional sovereignty.[18]

The rules were specifically promulgated to clarify tribal jurisdiction over air regulation and to prevent state incursion.[19] Thus, the rules serve as an important step—economically, environmentally and respectfully—towards the comprehensive regulation of public health and welfare in Indian country.

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[17] *Id.*

[18] Capriccioso, *supra* note 3.

[19] *See Major New Source Review (NSR) Rule Webinar: Tribal Environmental Professionals*, U.S. Envtl. Prot. Agency 7 (July 20, 2011), http://www.epa.gov/air/tribal/pdfs/NSRBasicsWebsite.pdf (listing "[p]rotecting tribal sovereignty from state incursion by clarifying jurisdiction" as a key benefit of the Tribal NSR Rule).

A. *Overview of New Source Review Under the Clean Air Act*

Understanding the role the NSR program plays in air pollution control requires some familiarity with the historical developments of federal environmental law, specifically the creation and evolution of the CAA. One of the CAA's purposes is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[20]

The CAA covers all sorts of air emissions,[21] applying to both aging and decrepit power plants and to the ones that will be built tomorrow.[22] To fulfill this broad regulatory mandate, the CAA attempts to preserve air quality through interacting health-based and technology-based standards. The NAAQS establish a cap of specified levels of emission for six criteria air pollutants. The NAAQS emissions caps are designed to reflect an adequate degree of safety necessary to protect public health.[23]

Based on our country's environmental history, believing that all areas would meet the requisite NAAQS levels was unrealistic. The areas of the country that do not meet the NAAQS for one or more of the six criteria pollutants are characterized as "nonattainment" for that pollutant.[24] Essentially, the areas of the country struggling with air quality have not "attained" the proper levels of each criteria pollutant. At the same time, those areas meeting NAAQS for criteria pollutants are considered "attainment zones."

Areas of the country that do not meet NAAQS for a specific criteria pollutant are in nonattainment for that criteria pollutant. Conversely, areas of the country that meet the NAAQS for a criteria pollutant are in attainment. While major stationary sources in both attainment and nonattainment zones must obtain a permit before new development or modification of the source,[25] designation as nonattainment could significantly impact economic development.[26] The distinction also obligates pollution-emitting entities to meet more aggressive regulatory obligations.

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[20] Clean Air Act § 301, 42 U.S.C. § 7401(b)(1) (2006).
[21] *See* 42 U.S.C. § 7408(a)(1) (criteria pollutants); *id.* § 7412(b) (initial list of hazardous air pollutants).
[22] Todd B. Adams, *New Source Review Under the Clean Air Act: Time for More Market-Based Incentives?*, 8 BUFF. ENVTL. L.J. 1, 6 (2000) ("It applies to power plants built over fifty years ago and ones that will be built tomorrow.").
[23] 42 U.S.C. § 7409(b)(1).
[24] *Id.* §§ 7407(d), 7501(2).
[25] *Id.* § 7503(a).
[26] *See, e.g.*, *Attainment v. Nonattainment*, IDAHO DEP'T ENVTL. QUALITY, http://www.deq.idaho.gov/air-quality/monitoring/attainment-v-nonattainment.aspx

Moreover, the NAAQS regime operates on the basis of a "cooperative-federalism" model.[27] Part of this cooperative approach is federally allowed state implementation of air quality standards. The CAA encourages states to submit State Implementation Plans (SIPs) to ensure compliance with the NAAQS.[28] The SIP must include a number of specific pollution control measures. Failure to submit an adequate SIP by the appropriate deadline subjects the state to various federal sanctions, such as the loss of federal highway funds or the imposition of an EPA-enforced FIP.[29]

The process of ensuring that new sources or modifications made to existing sources meet statutory obligations has become known as New Source Review (NSR). NSR is an essential component of the efforts to maintain air quality. At the same time, the NSR program has been a cause for contention between the EPA, state air quality agencies and existing facilities.[30] From its inception, the CAA has required new sources to install advanced pollution control technology.[31] This policy decision established two different regulatory regimes—those for new and old sources. While many old sources were "grandfathered in" such that they were able to continue operating subject to a few restrictions, new sources that produce air pollution "which may reasonably be anticipated to endanger public health or welfare" are required to install federally established new source performance standards (NSPS).[32] The NSR program thus adds another layer of regulation to facilities that may already be subject to NSPS standards.

Permitting under NSR is divided into three different programs. First, the PSD program applies to new major sources or sources making major

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(last visited Mar. 30, 2013) ("[I]t is costly and time-consuming to develop and implement plans to retain attainment status."); *FAQs About Attainment and Nonattainment*, NEB. DEP'T ENVTL. QUALITY, http://deq.ne.gov (last visited Mar. 30, 2013) ("[T]here could be indirect, costly consequences due to the designation . . . .").

[27] Jonathan H. Adler, *When Is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67, 87 (2007); *see also* New York v. United States, 505 U.S. 144, 167 (1992) ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation . . . . This arrangement . . . has been termed . . . 'a program of cooperative federalism.'" (citations omitted)).

[28] 42 U.S.C. § 7410(a)(1).

[29] *Id.* §§ 7410(m), 7509(b).

[30] The friction between the EPA and state air quality agencies will be highlighted *infra* Part III.

[31] *See* 42 U.S.C. § 7411.

[32] *Id.* § 7411(b)–(c) (requiring the Agency to set emission performance standards for stationary sources that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare").

modifications to existing sources in attainment zones.[33] Second, the Nonattainment NSR (NNSR) program is designed to promote air quality in areas that are out of compliance with one or more of the NAAQS.[34] "NSR requires the most stringent emission limits and also requires sources to offset increased emissions by reducing emissions elsewhere at the facility, or by obtaining Emission Reduction Credits (ERCs) from nearby facilities."[35] Finally, the Minor Source NSR program provides permits for sources not covered by PSD or NNSR. "The purpose of minor NSR permits is to prevent the construction of sources that would interfere with attainment or maintenance of a National Ambient Air Quality Standard (NAAQS) or violate the control strategy in nonattainment areas."[36] Together these permitting requirements clarify the law governing new sources of modification to sources throughout the United States—except in Indian country. The new Final Rule finally clarifies the applicability of these permitting processes to Indian country.

B. *The Clean Air Act and Tribal Environmental Protection*

Actions by tribes to regulate air quality have been missing. Specifically, "[o]nly a few tribes, such as the St. Regis Mohawk Tribe and the Gila River Indian Community, have provided for administration of EPA-approved Minor NSR programs as part of tribal implementation plans (TIPs). As a result, the majority of minor sources in Indian Country have gone unregulated."[37] Tribal initiative to regulate air quality has occurred, although it has been limited in many respects by specific regulatory gaps in the administration of the CAA. Unfortunately, the tribes that are currently regulating air quality do not differ from the majority of tribes fighting to protect the health and welfare of their people.

The U.S. portion of the St. Regis Mohawk reservation resides on 14,600 acres and is located in New York State along the Canadian border.[38]

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[33] 40 C.F.R. § 52.21 (2012).

[34] 40 C.F.R. pt. 51, app. S.

[35] *Clean Air Act Requirements for Air Pollution Sources in Indian Country*, U.S. ENVTL. PROT. AGENCY, May 2008, at 2; *see also Nonattainment NSR Basic Information*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/NSR/naa.html (last visited Mar. 30, 2013) ("Nonattainment NSR requirements are customized for the nonattainment area. All nonattainment NSR programs have to require (1) the installation of the lowest achievable emission rate (LAER), (2) emission offsets, and (3) opportunity for public involvement.").

[36] *Minor NSR Basic Information*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/NSR/minor.html (last visited Mar. 30, 2013).

[37] Gruenig, *supra* note 13.

[38] Jana B. Milford, *Tribal Authority Under the Clean Air Act: How Is it Working?*, 44 NAT. RESOURCES. J. 213, 223 (2004).

"About 10,000 people live on the reservation, including approximately 5000 members of the St. Regis Mohawk tribe."[39] While no large sources are located on the reservation, many small sources (such as aluminum smelters) and a nearby Superfund site encouraged the tribe to establish its own air quality regulations.[40] As part of its TIP, the Tribe's Air Quality Code regulates companies that emit toxic metals and provides "review of state permits for facilities located in contiguous jurisdictions," and the tribe hopes to administer its own minor source permit program in the near future.[41]

Similarly, the Gila River Indian Community in Arizona has a population of 13,500 on a 374,000 acre reservation, on which a number of aluminum processing facilities are located.[42] Gila River's TIP includes permitting programs for synthetic minor sources, small sources and hazardous waste.[43] While these communities have taken leadership in managing air quality, the vast majority of tribal communities have been unable to replicate this engagement.

The St. Regis Mohawk Tribe and the Gila River Indian Community are, unfortunately, outliers; the vast majority of tribes have been unable to receive the approval of the EPA to develop similar rules. Tribal hesitance to pursue TIPs is not the sole reason a lack of permitting developed in Indian country. Rather, "before the new rules were enacted, tribes in most regions that bothered to ask for permits were refused."[44] Similarly, tribes' and environmental groups' petitions to review permitting authorization were denied[45]—restricting the involvement of tribes in regulating air quality. The EPA's new Final Rule is designed to help fill this regulatory gap. This section examines what tribes and the EPA are doing to control air pollution—specifically from minor sources—originating in Indian country and what this means for small business development.

The last forty years in federal Indian law have been marked as a time of tribal self-determination.[46] Throughout this period, the EPA has reinforced

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[39] *Id.*
[40] *Id.*
[41] *Id.* at 224.
[42] *Id.*
[43] *Id.*
[44] Capriccioso, *supra* note 3.
[45] *See e.g.*, *In re* Shell Gulf of Mexico, Inc., OCS Appeal Nos. 10-01 through 10-04 (EAB Dec. 30, 2010), 15 E.A.D.___. This appeal involved the challenges to the issuance of permits to Shell for exploratory drilling in the Outer Continental Shelf (OCS) of the Arctic Ocean. *Id.* While not part of Indian country, the drilling could significantly hinder air quality management in Indian country.
[46] *See, e.g.*, Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 816–23 (2006) (describing the era of self-determination and the contemporary federal policy in supporting self-governance).

the self-determination model. In 1984, the EPA became the first federal agency to formally adopt an "Indian policy" governing its interactions with tribes.[47] The policy noted that tribal governments are "sovereign entities with *primary* authority and responsibility for the reservation populace."[48] Accordingly, the policy assumes tribal regulatory responsibility but is premised upon a default model where the EPA retains responsibility *until* a tribe assumes responsibility.[49] Furthermore, the EPA, with tribal assistance, secured amendments inserting general "treatment as state" (TAS) provisions[50] in most of the major environmental statutes.[51] Specifically, for the purpose of administering air programs, tribes have been granted TAS under the CAA.[52] Next, to implement the CAA's "treatment as state" provision, the EPA promulgated the Tribal Authority Rule (TAR) in 1998.[53]

Under 42 U.S.C. § 7410, tribes can develop TIPs, the tribal equivalent of SIPs, to regulate air quality on reservations.[54] TIPs are created to implement a regime to regulate air quality to meet the standards required

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[47] Policy Statement, William D. Ruckelshaus, U.S. Envtl. Prot. Agency, EPA Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984).

[48] *Id.* (emphasis added).

[49] Milford, *supra* note 38, at 219–20.

[50] James M. Grijalva & Daniel E. Gogal, *The Evolving Path Toward Achieving Environmental Justice for Native America*, 40 ENVTL. L. REP. 10,905, 10,910 n.46 (2010) ("[TAS] eligibility criteria vary among the statutory programs but require generally that the tribe be federally recognized by the U.S. Department of the Interior, have a governing body carrying out substantial duties and powers, and demonstrate technical capability and legal authority to manage and protect the Indian country environment.").

[51] *See, e.g.*, Water Quality Act of 1987 § 506, 33 U.S.C. § 1377 (2006); Public Health Service Act (PHSA) § 1401, 42 U.S.C. § 300f(1) (2006); Clean Air Act §§ 107(d), 108(i), 42 U.S.C. § 7601(a)(1), (d) (2006); Superfund Amendments and Reauthorization Act of 1986 (SARA) §207(e), 42 U.S.C. § 9626.

[52] 42 U.S.C. § 7601(d)(1)(A); *see id.* § 7474(c) (stating that re-designation of reservation air quality standards can only be done by "the appropriate Indian governing body").

[53] 63 Fed. Reg. 7254, 7254 (Feb. 12, 1998) (codified at 40 C.F.R. pts 9, 35, 49, 50 & 81).

[54] 42 U.S.C. § 7410(o) ("If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.").

under the NAAQS,[55] and TIPs must neither interfere with PSD nor hinder the air quality of neighboring states or tribal areas.[56] Unlike SIPs, TIPs can allow joint tribal and EPA management.[57] Finally, Indian tribes have the same authority as states to petition the EPA to enforce CAA requirements in surrounding states or tribes.[58]

This regulatory framework has provided tribes with authority to control air quality management decisions affecting their jurisdiction. Since the 1990 amendments to the CAA, thirty-two tribes have received TAS under the TAR.[59] Three separate tribes have successfully petitioned the EPA for approval of TIPs to implement and enforce tribally designed air quality standards.[60] Finally, "one tribe has received a delegation (under Clean Air Act Part 71) to implement a Title V operating permit program for their reservation."[61] Such steps have furthered the model articulated in the EPA's Indian policy. This program is "based on initial federal implementation where feasible, with aspirations for later program assumption by Indian tribal governments."[62] To date, this pattern has largely been followed. "[T]ribes have demonstrated increasing interest in developing and administering their own air programs. As one illustration, the number of tribes receiving federal grants to initiate or operate air programs has grown from about 20 in 1995 to more than 120 in 2002."[63] Tribes have exercised the power to develop permitting programs for new or modified stationary

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[55] *See, e.g.*, 40 C.F.R. § 49.202–.5513 (2012).
[56] 42 U.S.C. § 7410(a)(2)(D).
[57] U.S. ENVTL. PROT. AGENCY, DEVELOPING A TRIBAL IMPLEMENTATION PLAN 23–24 (2002).
[58] *See* 42 U.S.C. § 7426 (explaining state authority to petition the EPA to exercise its enforcement powers).
[59] *Tribal Air, Basic Information*, U.S. ENVTL PROT. AGENCY, http://www.epa.gov/oar/tribal/backgrnd.html (last visited Mar. 30, 2013).
[60] News Release, U.S. Envtl. Prot. Agency, EPA Approves First Ever Clean Air Act Plan for Reducing Air Pollution Developed by a Tribe; St. Regis Mohawk Tribe Emerges as Environmental Leader (Oct. 30, 2007); News Release, U.S. Envtl. Prot. Agency, EPA Approves Nation's Most Comprehensive Tribal Air Quality Plan (Jan. 19, 2011); Meline MacCurdy, *EPA Approves First Tribal Implementation Plans Under the Clean Air Act: Questions Concerning Scope of Tribal Authority Remain*, MARTEN L. (Jan. 2, 2008), http://www.martenlaw.com/newsletter/20080102-caa-implementation-plans.
[61] *Tribal Air, Basic Information, supra* note 59.
[62] Grijalva & Gogal, *supra* note 50, at 10,905.
[63] Milford, *supra* note 38, at 213–14.

source polluters,[64] craft and implement CAA air quality standards[65] and potentially influence neighboring states' air policies.[66]

Despite extensive regulation of air quality throughout the United States and increasing tribal interest in stewarding environmental protection in Indian country, enforceable standards for minor sources and major sources in nonattainment areas on tribal lands have been noticeably missing.[67] The announcement of these long-awaited rules can come as little surprise to the industry. The first mention of developing NSR rules for Indian country was over a decade ago and this rulemaking offers much needed regulatory clarity.

C. *New Rule: Parity in Air Quality Regulations*

The new Final Rule has been heralded as a solution to a long-standing problem: how to regulate new minor and major sources in Indian country.[68] Before looking at the new regulatory regime, however, it should be mentioned that the EPA has not been completely negligent in regulating air quality in Indian country. "The EPA currently administers a Title V operating permits program for major stationary sources located on reservations, along with a PSD pre-construction permit program for new major sources or source modification in an attainment area."[69] Still, the gap left—the omission of rules or regulatory oversight capacity for minor sources—principally constrained small business development. A small business entity, e.g., a dry cleaner, wishing to startup in Indian country, would be presented with a Hobson's choice: begin operations without a minor source permit, unprepared for the financial obligation of future permitting, or apply for major source permitting that is expensive and time-consuming.[70]

The response to this unenviable choice, one that harmed both economic development and failed to address the long-standing concerns of environmental degradation in Indian country,[71] was not quick. Beginning in

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[64] *See* 42 U.S.C. § 7502(c)(5) (2006).
[65] *See id.* § 7410.
[66] Vanessa Baehr-Jones & Christina Cheung, Note, *An Exercise of Sovereignty: Attaining Attainment for Indian Tribes Under the Clean Air Act*, 34 ENVIRONS ENVTL. L. & POL'Y J. 189, 191 (2011).
[67] *See* Capriccioso, *supra* note 3.
[68] *Id.*
[69] Milford, *supra* note 38, at 226.
[70] Philip Baker-Shenk et al., *New Tribal Authority for EPA Clean Air Act Permits*, HOLLAND & KNIGHT MULTIMEDIA (Aug. 1, 2011), http://www.hklaw.com/news/uniEntity.aspx?xpST=MediaDetail&media=33.
[71] *See* Wolfley, *supra* note 4.

1997, the EPA began discussing proposed rules but the process was delayed until 2005, when additional steps were taken to garner input from tribes to finalize proposed rules.[72] In 2006, the Bush administration released draft regulations but these stalled until the Obama administration released the rules five years later in 2011.[73]

1. *The Regulatory Framework*

Meant to fill regulatory gaps by creating parity between Indian and non-Indian country, the rules model much of the current CAA framework. As described by the EPA:

> Our primary goal in developing this program is to ensure that air resources in Indian country will be protected in the manner intended by the Act. In addition, we seek to establish a flexible preconstruction permitting program for minor sources in Indian country that is comparable to similar programs in neighboring states in order to create a more level regulatory playing field for owners and operators within and outside of Indian country.[74]

This means that businesses affected by the new rules will be required to follow an NSR program similar to those in place in non-tribal lands. "Initially, EPA will implement the new NSR rules through a FIP [Federal Implementation Plan]. However, a tribe can seek either delegation from EPA to enforce the rules (minus the enforcement or appeal components) or, alternatively, approval of a TIP in order to administer and implement the rules."[75] Thus, the Final Rule can serve either as the mechanism to establish air quality regulation in Indian country, or tribes can undertake implementation of the programs themselves. "By implementing its own TIP, a tribe will have the ability to charge permit fees under its own authority, something that EPA is currently unable to do under the CAA."[76] This new framework would facilitate the EPA's Indian policy of supporting the development of tribal capacity and eventual administration of air quality standards for minor and major NSR.[77]

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[72] Capriccioso, *supra* note 3 (citing Janet McCabe, principle deputy assistant administrator for EPA's Office of Air and Radiation).

[73] *See* Review of New Sources and Modifications in Indian Country, 76 Fed. Reg 38,748 (Aug. 11, 2011) (to be codified at 40 C.F.R. pts. 49 & 51).

[74] *Id.* at 38,754.

[75] Gruenig, *supra* note 13.

[76] *Id.*

[77] *See Tribal Air, Basic Information*, *supra* note 59.

a. *The New Tribal Minor NSR Rule*

The Tribal Minor NSR Rule covers facilities and small businesses with the potential to emit pollutants (such as carbon monoxide, nitrogen oxides, particulate matter, lead and volatile organic compounds) in amounts that fall below the major source threshold (100 or 250 tons per year) but are higher than minor source limitations.[78] The Final Rule also creates a framework for developing three specific minor source permits, including site-specific permits, general permits and synthetic minor permits.[79]

First, site-specific permits require a case-by-case determination of the source's emission limits as well as any control technology requirements in place.[80] One of the most important features of the Minor NSR rule is the timing of the phase-in period for minor sources. New minor sources that are site specific must register within the first thirty-six months of the rule's effective date.[81] Existing minor sources need to register within eighteen months after the rule's effective date or ninety days after the source becomes operational.[82]

Second, general permits are developed by the EPA after public notice and opportunity for comment.[83] Rather than being issued on a case-by-case basis, a general permit is a "preconstruction permit that may be applied to a number of similar emissions units or minor sources. The purpose of a general permit is to simplify the permit issuance process for similar facilities so that a reviewing authority's limited resources need not be expended for site-specific permit development."[84] The phase-in requirement for minor sources under general permits is similar to existing sources. The sources must be registered within eighteen months after the rule becomes effective, ninety days after the source becomes operational *or* six months after a general permit for the source's category is published by the EPA, whichever is earlier.[85]

Finally, synthetic minor permits are available for sources with the potential to emit above the major source threshold but voluntarily accept emissions limits below this limit to avoid the onerous process of complying with those provisions of the CAA.[86] For synthetic minor sources, "the

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[78] Gruenig, *supra* note 13, at 4.
[79] *Id.*
[80] Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. 38,748, 38,759–60 (Aug. 11, 2011) (to be codified at 40 C.F.R. pts. 49 & 51).
[81] *Id.* at 38,769.
[82] *Id.* at 38,751, 38,772.
[83] *Id.* at 38,750.
[84] *Id.* at 38,767.
[85] *Id.* at 38,751, 38,772.
[86] Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. at 38,769.

permit issuance process timeline includes, as proposed, a period of 60 days for the application completeness review as well as a 30-day public comment period."[87]

Regardless of the type of permit, the Tribal Minor NSR Rule may also require an Air Quality Impact Analysis (AQIA) "if [the reviewing authority] has reason to be concerned that the construction of your minor source or modification would cause or contribute to a NAAQS or PSD increment violation."[88] Additionally, the rule may require public participation through notice and comment,[89] administrative and judicial review upon a permit appeal[90] and registration of the permit with the reviewing authority.[91] Ultimately, this rule brings Indian country into parity with the rest of the country by clarifying the rules for minor sources. This, in turn, is expected to encourage economic development in Indian country by finally providing regulatory clarity.

b. *Major NSR for Non-Attainment Land*

Before the promulgation of the Final Rule, the EPA had a FIP in place to regulate major sources in the parts of Indian country currently classified as attainment zones.[92] The Tribal Nonattainment Major NSR Rule will close an important regulatory gap by requiring permits in the areas of Indian country not meeting NAAQS. Under the rule, facility and business owners will be required to meet the most stringent requirements of the CAA, including LAER control technology[93] and "[e]mission reductions (offsets) from existing sources in the area of the proposed source."[94] This rule brings Indian country regulations into parity with the rest of the nonattainment portions of the United States that are already required to meet these stringent standards.

c. *Implementation of the New Final Rule*

The EPA has developed an Implementation Guidance Document (IGD) to provide tribes and small business owners with a comprehensive understanding of the new rules.[95] The IGD "include[s] some general

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[87] *Id.* at 38,763. This timing regulation is the source of controversy in *American Petroleum Institute v. EPA*, discussed *infra* Part III.B.
[88] *Id.* at 38,790.
[89] *Id.* at 38,806.
[90] *Id.* at 38,805.
[91] *Id.* at 38,757 n.15.
[92] *See supra* note 69 and accompanying text.
[93] 76 Fed. Reg. at 38,773.
[94] *Id.*
[95] *See* U.S. ENVTL. PROT. AGENCY, TRIBAL NEW SOURCE REVIEW IMPLEMENTATION MANUAL (May 2012).

information on air quality, explanations of specific rules, process materials and template materials"[96] meant to aid business owners and the regional EPA managers to put the rules to use in order to encourage economic development and air quality regulation.

2. *What Does this Mean for Business Owners?*

Air quality management has historically been viewed as promoting tension between economic development and environmental concerns. The tension between these two concerns is pronounced for tribes who want to maintain the pristine nature of their air quality while pursuing economic opportunity.[97] In actuality, this diametric framing is unhelpful and inaccurate. With the availability of pre-construction and operating permits (either administered by the tribe or the EPA), economic development is more likely to be encouraged than hindered. Tribes can now bring unregulated sources under control and effectuate enforcements of these new standards.[98] Additionally, tribes can simultaneously encourage economic development by crafting timely and cost-effective permit mechanisms and by providing businesses with regulatory certainty.[99]

The Final Rule directly responds to the regulatory uncertainty prompted by twenty years of waiting for rules to be promulgated by the EPA. Describing environmental regulation in Indian country following the 1990 Amendments, one commentator characterized regulatory uncertainty as "[a] reality for the present."[100] Recognizing that "jurisdictional uncertainties and the potential for overlapping and conflicting regulatory schemes are counterproductive to sound environmental regulation and efficient resource and business development,"[101] efforts to remove this regulatory uncertainty were long overdue. This uncertainty has been lifted; now tribes can plan to protect the environment and develop economic opportunities.

Given these new developments, practitioners should consult with their clients to ensure compliance with the rules. Specifically, a small business must decide if the rules apply to their facility or if changes in the future would implicate the NSR rules. This is a simple two-step process: first, if the level of pollutants emitted is lower than the major source threshold, NSR minor source permitting may be required. "[F]or example, the significance level for PM_{10} is 15 tpy while the major source threshold is 100

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[96] *Id.* at 1.
[97] Milford, *supra* note 38, at 240.
[98] *Id.*
[99] *Id.*; *Major New Source Review (NSR) Rule Webinar, supra* note 19.
[100] Walter E. Stern, *Environmental Regulation on Indian Lands: A Business Perspective*, NAT. RESOURCES & ENV'T, Spring 1993, at 20.
[101] *Id.*

or 250 tpy."[102] Thus, the client would turn to the second question: "[I]f your proposed new source is not subject to major NSR . . . determine whether the source is subject to the requirements of this minor NSR rule for that pollutant."[103] This would mean that "if the source's potential to emit of the pollutant is equal to or greater than the applicable minor NSR threshold listed in Table 1 of this final rule,"[104] then the new rule applies. If the business must comply with NSR requirements, compliance might include the installation of control technologies or the undertaking of an air quality analysis before beginning construction.[105]

It is essential to determine if a pre-construction permit is necessary; failing to file and receive the requisite permit before developing new sources or modifying existing sources makes a company vulnerable to enforcement actions and corresponding penalties. The Department of Justice's Environment and Natural Resources Division (ENRD) has vigorously pursued civil actions to "enforce the new source review provisions."[106] In fact, ENRD has stated that it is continuing to prioritize enforcement of NSR permit programs through a national enforcement initiative for 2011–2013.[107] Failures to comply with the NSR program will not be overlooked.

One of the EPA's main hopes in promulgating these new rules is that the rules will encourage economic development in Indian country.[108] Unfortunately, there are still a number of potential delays that could hinder the rules from effectuating their broad purpose. As one commentator noted, "[i]f this new NSR rule is to have any real value in this era when the EPA is in a defensive posture under political siege from Capitol Hill, top EPA officials will have to insist that EPA mid-level officials give top priority to timely processing of tribal applications."[109] The failure to do so would be harmful to both tribal economies and environments. Without such action,

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[102] Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. 38,748, 38,755 (Aug. 11, 2011) (to be codified at 40 C.F.R. pts. 49 & 51).
[103] *Id.*
[104] *Id.*; *see also infra* Table 1.
[105] U.S. ENVTL. PROT. AGENCY, MINOR NEW SOURCE REVIEW (NSR) RULE FOR INDIAN COUNTRY: AN OVERVIEW FOR SMALL BUSINESS 2 (2011).
[106] U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, NEW SOURCE REVIEW: AN ANALYSIS OF THE CONSISTENCY OF ENFORCEMENT ACTIONS WITH THE CLEAN AIR ACT AND IMPLEMENTING REGULATIONS vi (2002).
[107] *See National Enforcement Initiatives for Fiscal Years 2008–2010: Clean Air Act: New Source Review/Prevention of Significant Deterioration*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/compliance/data/planning/priorities/caansrpsd.html (last visited Mar. 30, 2013).
[108] *See Major New Source Review (NSR) Rule Webinar*, *supra* note 19 (listing "leveling the economic playing field" as a key benefit of the Tribal NSR Rule).
[109] Capriccioso, *supra* note 3.

"the last two decades of a regulatory gap will be followed by more decades of bureaucratic inaction that keeps what remains of Indian country an impoverished archipelago."[110] Still, the Final Rule has created optimistic hopes for economically sensible environmental regulation in the future.

III. "MUCH ADO ABOUT NOTHING"?

Judicial Challenges to NSR Pending: "Let me be that I am and seek not to alter me."[111]

While the majority of this comment has sought to frame the introduction of these new rules governing tribal air quality management in the context of environmental protection in Indian country in order to reveal their impact and importance, the rules' successful implementation is not assured. Two legal challenges to the Final Rule are pending in the U.S. Court of Appeals for the District of Columbia.[112] A successful legal challenge in the D.C. Circuit would erase a decade of work between the EPA and tribes. Initially, the court consolidated these cases on its own motion and held in abeyance the actions while the EPA considered administrative petitions and supplemental administrative petitions for reconsideration of certain aspects of the Tribal NSR Rule.[113] These challenges are discussed below.

A. Oklahoma Department of Environmental Quality v. EPA: *Asserting State Prerogatives*

The main challenge to the Final Rule has been filed by the Oklahoma Department of Environmental Quality (ODEQ). Principally, ODEQ challenges the EPA's authority to issue a nationwide FIP for Indian country when part of the covered land involves Oklahoma property. This is a classic example of state-federal disagreement over NRS. ODEQ raises a number of concerns.

Primarily, ODEQ asserts that a nationwide plan, or "blanket federal implementation plan," that includes individual allotments of land outside of Indian reservations is contrary to limitations placed on federal authority in

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[110] *Id.*

[111] WILLIAM SHAKESPEARE, MUCH ADO ABOUT NOTHING act 1, sc. 3, l. 25 (Plain Label Books 2008).

[112] Okla. Dep't of Envtl. Quality v. U.S. Envtl. Prot. Agency, No. 11-1307 (D.C. Cir. Aug. 29, 2011); Am. Petrol. Inst. v. U.S. Envtl. Prot. Agency, No. 11-1309 (D.C. Cir. Aug. 30, 2011).

[113] *See* Clerk's Order, Okla. Dep't of Envtl. Quality v. U.S. Envtl. Prot. Agency, No. 11-1307 (D.C. Cir. Dec. 27, 2012); Response in Support, Okla. Dep't of Envtl. Quality v. U.S. Envtl. Prot. Agency, No. 11-1307 (D.C. Cir. Dec. 14, 2012).

the CAA.[114] This includes arguments that the Final Rule was enacted beyond the statutory jurisdiction of the CAA, contravenes limitations of provisions promoting SIPs and defining tribal issues and constitutes arbitrary and capricious rulemaking.[115] Instead, ODEQ argues that implementation should be done on a jurisdiction-by-jurisdiction basis; this requires consideration of state interests as well as tribal interests in outside reservation allotments.[116] Finally, ODEQ argues—in rather vague terms—that the EPA failed to follow procedures required by the CAA and other acts.[117] This challenge reignites long-standing disagreements about control of Indian country—primarily between the federal government and the states—with the former encouraging tribal autonomy and the latter asserting states rights. The court has severed this challenge from the American Petroleum Institute (API) case and ODEQ has submitted its petition for review.[118]

B. American Petroleum Institute v. EPA: *Big Business Goes After The New Rules*

The second challenge has been brought by the API challenging specific timing requirements as part of registering for permits for Synthetic Minor NSR.[119] In API's Statement of Issues, it asked the court "[w]hether EPA's establishing for synthetic minor sources an effective date of August 30, 2011,—*i.e.*, only 60 days after promulgation—while delaying implementation of the rule for 36 months for other categories of sources, is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[120]

As part of API's litigation strategy, it (along with the Independent Petroleum Association of America and America's Natural Gas Alliance), asked Lisa Jackson, the EPA Administrator, to stay application of the Final

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[114] *See* Petitioner's Statement of Issues To Be Raised, Okla. Dep't Envtl. Quality v. U.S. Envtl. Prot. Agency at 1, No. 11-1307 (D.C. Cir. Sept. 29, 2011) [hereinafter ODEQ Statement].

[115] *Id.* at 1–2 (relying upon CAA provisions related to SIPs and the authority of the EPA Administrator to regulate tribal environmental issues).

[116] *Id.* at 2.

[117] *Id.*

[118] *See* Brief for Petitioner, Okla. Dep't Envtl. Quality v. EPA, No. 11-1307 (D.C. Cir. Mar. 25, 2013).

[119] EPA's Response to ODEQ's Motion to Terminate Order Holding Case in Abeyance, Okla. Dep't Envtl. Quality v. U.S. Envtl. Prot. Agency at 2, No. 11-1307 (D.C. Cir. Dec. 14, 2012) ("API's petition primarily raises issues concerning the CAA permitting requirements and deadlines under the Tribal NSR Rule.").

[120] Petitioners' Nonbinding Statement of Issues at 1–2, Am. Petrol. Inst. v. U.S. Envtl. Prot. Agency, No. 11-1309 (D.C. Cir. Sept. 30, 2011).

Rule.[121] In addition, API asked that the EPA reconsider the effective date of the Final Rule as it applies to synthetic minor sources.[122] The EPA decided not to reconsider the Final Rule, finding that part of API's request did "not meet the requirements for reconsideration under CAA section 307(d)(7)(B). Rather . . . Petitioners' concerns regarding these issues appear to be based on a misunderstanding of the Tribal Minor NSR Rule provisions."[123] This case has also been severed from the ODEQ action and appears to be heading for review.

IV. CONCLUSION

> *The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment . . . declares that it is the continuing policy of the Federal Government . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . .*[124]

Rarely have our environmental laws effectuated the National Environmental Policy Action's bold purpose—improve the environment while also benefitting economic development. Compatibility between environmental regulation and business is viewed as anathema or, at least, unrealistic. Former EPA Administrator, Carol Browner, stated, "the nation must come together and take responsible, common sense steps to ensure protection of public health and the environment in every one of this nation's communities. Ensuring the basic rights of every citizen is not about stopping development, but about responsible development."[125]

The economic costs of environmental regulation have been long debated. Contemporary consensus on the topic is that industry will not respond to environmental challenges until they are economically feasible.[126]

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[121] *See* Letter from Lisa P. Jackson, Adm'r, U.S. Envtl. Prot. Agency, to Matt Todd, Senior Policy Advisor, Am. Petrol. Inst. (Dec. 19, 2012), *available at* http://www.epa.gov/NSR/tribalnsr/2012api.pdf.

[122] *Id.*

[123] *Id.*

[124] National Environmental Policy Act of 1969 § 101, 42 U.S.C. § 4331(a) (2006).

[125] Carol Browner, Adm'r, U.S. Envtl. Prot. Agency, Remarks at the Environmental Justice Roundtable, Detroit, Michigan (July 17, 1998).

[126] *See* Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration*, 34 HARV. J.L. & PUB. POL'Y 421, 449 (2010); Cass R. Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, 31 HARV. ENVTL. L. REV. 1, 5 (2007); *see also* Daniel P. Selmi, *Impacts of Air Quality Regulation on Economic Development*, 13 NAT. RESOURCES

Garnering industry support (or at least compliance) with the strict requirements of air quality has been difficult. "The effect of air pollution regulation on economic development is shaped by a mix of various forces that interact in complex ways to determine the support for and the shape of, air pollution rules."[127] The primary concerns of the CAA are public health related—not economic.[128]

At the same time, environmental degradation has been particularly significant in Indian country.

> American Indian tribes and Alaska Native communities have suffered, and continue to suffer, serious negative impacts caused by the dispossession of their lands and the lack of resources to develop in accordance with their own aspirations, as well as pressures on their cultural, political, spiritual, economic, and other societal considerations.[129]

This degradation has the additional burden of not only affecting the "health of indigenous communities but, quite often, their very identity and survival as distinct peoples and cultures."[130] The burdens of quasi-sovereign status have affected tribes' abilities to manage environmental regulation. "Native tribes have a unique role in federal environmental law, but that role does not always allow adequate protection of the environment upon which they depend."[131] As evidenced by the work of the St. Regis Mohawk Tribe and the Gila River Indian Community, tribes are interested in taking leadership in environmental management but have been constrained by a lack of regulatory clarity and dearth of economic and technical resources.[132]

For over two decades, the EPA failed to fulfill an important promise of the CAA Amendments of 1990—establishing a *comprehensive* regulatory framework governing air quality management in Indian country that also promotes small business development. These new rules do so. In the place of ambiguity and uncertainty, tribal governments can rely upon the EPA's model or develop their own. The Tribal NSR Rules not only fill an

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& ENV'T 382, 382 (1998) ("A continuing theme in the history of air pollution law over the past twenty-five years has been the attempt to accommodate economic development within strict clean air standards.").

[127] Selmi, *supra* note 126, at 446.

[128] *See* Union Elec. Co. v. U.S. Envtl. Prot. Agency, 427 U.S. 246, 249 (1976); Selmi, *supra* note 126, at 382 ("By establishing a core goal that is health-related, the Act deliberately ensures that economic considerations will play a subordinate legal role in air quality regulation.").

[129] Grijalva & Gogal, *supra* note 50, at 10,905.

[130] *Id.*

[131] Cody McBride, Note, *Making Pollution Inefficient Through Empowerment*, 39 ECOLOGY L.Q. 405, 431 (2012).

[132] *See* discussion *supra* Part II.B.

important regulatory gap but also provide an incredible opportunity for tribal communities to facilitate economic development—particularly for small business owners. By developing timely and effective permit mechanisms and removing the uncertainty surrounding future permit obligations, small business will no longer be deterred from establishing roots in Indian country.

The next stage of this saga can unfold in one of two ways: either the D.C. Circuit will strike down the Final Rule as beyond the scope of the CAA, or Tribal Governments will be permitted to develop TIPs in place of federal standards. The latter outcome would better facilitate implementation of the EPA's Indian policy of promoting federal leadership, leading to tribal capacity building and eventual tribal leadership. The other outcome—striking down the rules—would result in a direct contradiction of the stated purposes of the Final Rule—"[p]rotecting tribal sovereignty from state incursion by clarifying jurisdiction."[133] Though lingering concerns still exist regarding the EPA's inability to comprehensively apply environmental regulations on tribal lands,[134] hopefully, tribes will be enabled to develop TIP and control air quality management in Indian country. More importantly, however, Indian tribes *should* be allowed to set their own standards for maintaining environmental and public health on reservations. Such a result would encourage economic growth—particularly for small business owners—particularly when the Final Rule attempts to do both.

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[133] *Major New Source Review (NSR) Rule Webinar*, *supra* note 19, at 7.

[134] Benjamin A. Kahn, *Separate and Unequal: Environmental Regulatory Management on Indian Reservations*, 35 ENVIRONS: ENVTL. L. & POL'Y J. 203, 205 (2012) ("[The EPA], however, has failed to adequately implement environmental regulatory programs on Indian reservations. There is no comprehensive application of federal environmental programs on Indian reservations. Furthermore, even where federal environmental policies are implemented on Indian reservations, it is not commensurate with state entitlements.").

APPENDIX

TABLE 1—MINOR NSR THRESHOLDS[a]

Regulated NSR pollutant	Minor NSR thresholds for nonattainment areas (tpy)	Minor NSR thresholds for attainment areas (tpy)
Carbon monoxide (CO)	5	10
Nitrogen oxides (NO_X)	5[b]	10
Sulfur dioxide (SO_2)	5	10
Volatile Organic Compounds (VOC)	2[b]	5
PM	5	10
PM_{10}	1	5
$PM_{2.5}$	0.6	3
Lead	0.1	0.1
Fluorides	NA	1
Sulfuric acid mist	NA	2
Hydrogen sulfide (H_2S)	NA	2
Total reduced sulfur (including H_2S)	NA	2
Reduced sulfur compounds (including H_2S)	NA	2
Municipal waste combustor emissions	NA	2
Municipal solid waste landfill emissions (measured as nonmethane organic compounds)	NA	10

[a] If part of a Tribe's area of Indian country is designated as attainment and another part as nonattainment, the applicable threshold for a proposed source or modification is determined based on the designation where the source would be located. If the source straddles the two areas, the more stringent thresholds apply.

[b] In extreme ozone nonattainment areas, section 182(e)(2) of the Act requires any change at a major source that results in any increase in emissions to be subject to major NSR permitting. In other words, any changes to existing major sources in extreme ozone nonattainment areas are subject to a "0" tpy threshold, but that threshold does not apply to minor sources.